

JUN 16 2006

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN THE MATTER OF:	:	CASE NUMBER: A05-77658-PWB
	:	
SIMON JAMES HORROCKS,	:	
	:	IN PROCEEDINGS UNDER
	:	CHAPTER 7 OF THE
Debtor.	:	BANKRUPTCY CODE
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	:	
MBNA AMERICA BANK, N.A.,	:	
	:	
Plaintiff	:	ADVERSARY PROCEEDING
	:	NO. 05-6571
v.	:	
	:	
SIMON JAMES HORROCKS,	:	
	:	
Defendant.	:	

**ORDER GRANTING DEFENDANT'S MOTION FOR ATTORNEY'S FEES
AND COSTS**

On May 5, 2006, the Court entered an Order granting the Debtor's motion for summary judgment, finding that the debt owed by the Debtor to MBNA America Bank, N.A., ("MBNA") is discharged. In addition, because of a procedural deficiency in the Debtor's request for fees, costs, and sanctions under Rule 9011 of the Federal Rules of Bankruptcy Procedure, the Order provided that "the Debtor may file a motion for sanctions, fees, and costs pursuant to Rule 9011 and § 523(d) within fifteen days of the entry date of this Order. The Defendant may file a response within twenty days of the filing of the Debtor's motion. The Court will then review the record as established and determine whether there are disputed facts that require an evidentiary hearing on the Debtor's Rule 9011 and § 523(d) motion."

The Debtor has now filed a motion for fees, costs, and sanctions pursuant to Rule 9011 and § 523(d) in which he requests an award of attorney's fees of \$3,030.00 with liability for such

to be imposed against MBNA and its counsel, Kenya Benning Green, of Green & Lewis, LLC, jointly and severally. Because no response has been filed to the Debtor's motion, the Court deems the motion unopposed. BLR 7007-1(c), NDGa.

Section 523(d) provides that when a creditor unsuccessfully seeks a determination of dischargeability under § 523(a)(2), the court "shall grant judgment in favor of the debtor for the costs of, and a reasonable attorney's fee for, the proceeding if the court finds that the position of the creditor was not substantially justified, except that the court shall not award such costs and fees if special circumstances would make the award unjust." In light of MBNA's failure to plead facts or a legal theory which support a claim under § 523(a)(2) consistent with this Court's holding in *FDS National Bank v. Alam (In re Alam)*, 314 B.R. 834 (Bankr. N.D. Ga. 2004), and MBNA's failure to respond to the Debtor's motion for summary judgment, the Court finds that MBNA's position was not substantially justified. Based on the itemized invoice for Debtor's counsel's time and fees, the Court finds that an award of \$3,030.00 is reasonable in this proceeding.

In addition, the Debtor relies on Rule 9011 for the imposition of fees, costs, and sanctions against MBNA and its counsel, Kenya Benning Green. Rule 9011 provides that

By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the persons's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, -

- (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
- (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
- (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
- (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or

belief.

If the court finds that a party has violated Rule 9011(b), the court may impose sanctions upon the attorneys, law firms, or parties responsible for the violation. FED. R. BANKR. P. 9011(c). The rule further provides that “[a]bsent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.” FED. R. BANKR. P. 9011(c)(1)(A).

Despite a request from the Debtor’s attorney that MBNA’s counsel withdraw the complaint, she failed to do so. Moreover, MBNA failed to respond to the Debtor’s requests for admissions, thereby admitting that it had no direct evidence of fraud on the part of the Debtor or that the Debtor made a false statement; failed to respond to the Debtor’s motion for summary judgment; and failed to respond to this motion for fees, costs, and sanctions. As such, the Court finds that MBNA lacked evidentiary support for its allegations in violation of Bankruptcy Rule 9011(b)(3) and that an award of fees in the amount of \$3,030.00 in favor of the Debtor and against MBNA and its counsel, Kenya Benning Green and Green & Lewis, LLC, jointly and severally, is warranted. Accordingly, it is

ORDERED that the Debtor’s motion for attorney’s fees, costs and sanctions is GRANTED. The Court awards attorney’s fees of \$3,030.00 to Debtor and against MBNA America Bank, N.A., and Kenya Benning Green, Green & Lewis, LLC, jointly and severally. A separate judgment shall be entered contemporaneously herewith.

The Clerk is directed to serve copies of this Order on the persons on the attached Distribution List.

At Atlanta, Georgia, this 15 day of June, 2006.

A handwritten signature in black ink, appearing to read "Paul W. Bonapfel", is written over a horizontal line.

PAUL W. BONAPFEL
UNITED STATES BANKRUPTCY JUDGE

DISTRIBUTION LIST

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